FILED
JUL 9 1993
OFFICE OF THE CLERK

No. 92-1370

In the Supreme Court of the United States

OCTOBER TERM, 1992

In re: **BFP**, A Partnership, Debtor

BFP, A Partnership,
Petitioner,
v.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ, JOSE CRUZ; RICHARD MARCZ,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief of Frank Allen, Levander and Elnora McKeever, the Consumer Education and Protective Association, the Consumers League of New Jersey, and Chapter 13 Trustee Edward Sparkman as Amici Curiae in Support of Petitioner

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STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Francis Allen is a New Hampshire resident who has filed bankruptcy pursuant to chapter 13 of the Bankruptcy Code. Mr. Allen's wife and six children live in a home which he purchased in 1980 and which has a value of $60,000.00. In 1989 Mr. Allen fell behind on his property taxes. Through 1992 his property tax arrears totalled approximately $5,700.00. In June of 1992, Mr. Allen lost title to his home to a tax foreclosure for a total price of $400.16, representing unpaid 1989 property tax. The tax foreclosure process thus recovered less than 1 percent of the value of the property.

Since filing bankruptcy in early 1993, Mr. Allen and the chapter 13 standing trustee for the District of New Hampshire have sought to set aside the tax foreclosure as a fraudulent transfer pursuant to 11 U.S.C. § 548. The case remains pending. If successful, some or all of the equity in the recovered property would be exempt. Mr. Allen has

proposed and would implement a bankruptcy plan to pay off his tax arrears with interest over time so that he and his family could keep the house by reorganizing under chapter 13. The outcome of Mr. Allen's case depends on the issues to be decided in the appeal before this court.

Levander and Elnora McKeever are residents of Chicago, Illinois. They purchased a single family home in Chicago in 1972. In 1986, a "tax purchaser", JoAnn McClandon, paid the unpaid taxes on their home, thereby acquiring a lien on their property. The McKeevers were unable to redeem their home from this lien. In 1988, McClandon obtained a tax deed to their home and in 1989 the McKeevers were evicted. At the time the tax deed was granted, the McKeevers' home was worth $53,000.00 and they had $32,000.00 of equity in their home.

McClandon paid a total of $4,645.11 in unpaid taxes and costs to obtain the property. The McKeevers lost the equity in their home for less than 15% of its value. Under

Illinois law, McClandon did not have to satisfy the mortgage the McKeevers had on their home before obtaining the tax deed. Thus, McClandon acquired a property worth $53,000.00 for less than 9% of its value.

In 1989, the McKeevers filed chapter 7 Bankruptcy. In 1990 they brought an adversary proceeding against the tax purchaser based upon 11 U.S.C. §§ 548(a)(2) and 11 U.S.C. 544(b), pursuant to 11 U.S.C. § 522(h). On October 29, 1991 the Bankruptcy Court denied the tax purchaser's motion to dismiss. In re McKeever, 132 B.R. 996 (Bankr. N.D. Ill. 1991). The adversary proceeding is scheduled for trial on July 19, 1993.

Amicus Consumer Education and Protective Association, Inc. ("CEPA") is a membership organization of primarily low-income consumers based in Pennsylvania. CEPA is dedicated to advancing the cause of consumer rights, and in particular, the support and protections of the policies and remedies found in the Bankruptcy Code that

enable distressed homeowners the opportunity to save their homes from foreclosure through a chapter 13 plan. Another of the protections of the Code which CEPA is dedicated to advancing is the debtor's right to obtain a fresh start after recovering property, most frequently a home in which they have an equity interest, pursuant to 11 U.S.C. § 548(a)(2).

The Consumers League of New Jersey ("Consumers"), founded in 1900, is a membership organization advocating the rights of consumers and homeowners. Consumers League believes that one of the strengths of the United States is the percentage of citizens who own their own homes, that keeping this percentage high is an important national goal, and hence that homeowners should be given every opportunity to save homes from foreclosure through the use of federal bankruptcy rights, including chapter 13 repayment plans. Co-Counsel for Consumers League and CLNJ Board member is Professor Philip Shuchman of Rutgers University School of Law School. Professor Shuchman was Deputy

Director of the Commission on the Bankruptcy Laws of the United States. Professor Shuchman has also published a statistical study which bears directly on the issue before this Court: Data on the Durrett Controversy, 9 Cardozo L. Rev. 605 (1987). There Professor Shuchman showed that in jurisdictions where court decisions followed the plain language of 11 U.S.C. § 548 (allowing recovery of property sold for less than "reasonably equivalent value") mortgage lending was just as robust as in those jurisdictions which nullified the language of § 548.

Amicus Edward Sparkman is the Chapter 13 Standing Trustee for the bankruptcy court for the Eastern District of Pennsylvania. He has the statutory duty to review and administer chapter 13 plans and represent the interest of the bankruptcy estate. A decision that a regularly conducted, non-collusive foreclosure sale demonstrates per se that a transfer was for reasonably equivalent value would undermine the Trustee's ability to recover property for the

benefit of the estate. This would run counter to the Bankruptcy Code's policy of fair and equitable distribution of the debtor's estate to all creditors, most particularly unsecured creditors who would benefit from the equity that would otherwise be unavailable to the estate. Further, Amicus believes that affirming the standard for determining reasonably equivalent value pursuant to 11 U.S.C. § 548(a)(2) as the Ninth Circuit held would undermine the delicate balance of debtor and creditor rights that exists in chapter 13 of the Bankruptcy Code.

SUMMARY OF THE ARGUMENT

Section 548(a)(2) of the Bankruptcy Code provides that the Trustee may avoid any transfer of an insolvent debtor's interest in property made within one year of the bankruptcy's filing where such transfer was constructively fraudulent. A constructively fraudulent transfer is defined as one in which the consideration given to the debtor is less than the reasonably equivalent value of the property. 11 U.S.C. § 548(a)(2). There is no exception stating that foreclosure sales are exempt from the avoidance powers of the Trustee pursuant to § 548(a)(2), nor did Congress intend that foreclosure sales be treated differently from other types of transfers. Nevertheless, in this case, the Ninth Circuit Court of Appeals created such an exception by judicial fiat, inserting into the language of § 548 the irrebuttable presumption that foreclosure sales are not avoidable regardless of the value received by the debtor, as long as they are "regularly conducted" and "non-collusive". BFP v.

Imperial Sav. & Loan Ass'n, (In Re BFP), 974 F.2d 1144, 1148 (9th Cir. 1992), cert. granted, 61 U.S.L.W. 3787 (1992). The Ninth Circuit's decision effectively eliminates the Trustee's power - explicitly provided for in § 548 of the Bankruptcy Code - to avoid foreclosure sales. That holding conflicts with the decisions of the Courts of Appeals for the Third, Fifth, Seventh, Eighth, and Eleventh Circuits.

There is no basis in the language or policy of the Bankruptcy Code, its legislative history, nor the policies underlying mortgage foreclosure and/or fraudulent conveyance law to support this judicial exception created by the Ninth Circuit. The decision completely undermines the essential policies underlying the Bankruptcy Code and § 548, which seek to grant the debtor a fresh start, to give effect to the Trustee's powers to avoid, and to provide for the equitable distribution of the debtor's estate to all creditors. Therefore, Amici support the Petitioner's contention that the Ninth Circuit decision must be reversed and that this Court

should adopt a test for "reasonably equivalent value" that is based on the loss of value experienced by the estate as a result of the transfer. Such a test has already been articulated by the Fifth Circuit in Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980).

ARGUMENT

I. CONGRESS HAS MADE CLEAR THAT A FORECLOSURE SALE IS A TRANSFER WITHIN THE MEANING OF SECTION 548

Section 548(a)(2) of the Bankruptcy Code clearly mandates that all transfers that are constructively fraudulent are voidable transfers in bankruptcy cases.[1] In response to several controversial circuit court decisions, Congress made

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[1] § 548(a)(2) provides that:

(a) The trustee may avoid any transfer of an interest of the debtor in property . . . that was made . . . on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

(2)(A) received less than reasonably equivalent value in exchange for such transfer . . . and,

(B)(i) was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer.

clear that foreclosure sales are subject to avoidance by the Trustee pursuant to § 548(a)(2). In 1980, the Fifth Circuit held that a lien enforcement of a debtor's interest in property, including a foreclosure sale or sheriff's sale, was a "transfer" within the meaning of § 548(a)(2). Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980); Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981), cert. denied, 454 U.S. 1164 (1982). The Ninth Circuit originally took the opposite position, holding that a "transfer" within the meaning of § 548 occurs only at the time that a security interest is perfected, not at the time of foreclosure sale. In re Madrid, 725 F.2d 1197, 1200-01 (9th Cir.), cert. denied, 469 U.S. 833 (1984).[2] A concurring opinion in Madrid disagreed with the majority's position that there can

[2] In In re Winshall Settlor's Trust, 758 F.2d 1136, 1138-40 (6th Cir. 1985), the Sixth Circuit followed the Ninth Circuit, holding that a foreclosure was not a transfer. This decision was a pre-Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAJFA") case. BAJFA is only effective for cases filed on or after October 8, 1984. Thus, courts continue to apply pre-BAJFA law in cases filed before that date.

only be one transfer at the time of perfection, but argued that a foreclosure sale still did not constitute a "transfer" under § 548 because it was not a voluntary transaction by the debtor. Id. at 1203-04.

In 1984, with the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAJFA"), Congress resolved this controversy, making clear its intention that foreclosure sales are among the types of transfers that can be avoided under § 548(a)(2). BAJFA amended the Bankruptcy Code's definition of "transfer" in § 101(54)[3] to include "foreclosure of the debtor's equity of redemption," 11 U.S.C. § 101(54), thereby adopting the Durrett analysis of "transfer" and overruling that of the Ninth Circuit in

[3] Prior to the 1984 amendment the definition of "transfer" was at 11 U.S.C. § 101(48). It did not specifically enumerate foreclosure of the debtor's equity in property. Between 1984 and 1990, the definition of "transfer" was at § 101(50) and did include foreclosure of the debtor's equity or redemption. The 1990 amendment did not alter the definition of transfer but changed its codification to § 101(54).

Madrid.[4] BAJFA also amended § 548(a) to explicitly provide that it is applicable to both voluntary and involuntary transfers of property, thereby overruling the concurring opinion in Madrid which would have held that § 548 does not apply to involuntary transfers. Therefore, with BAJFA, Congress overruled Madrid and its progeny. In fact, Congress specifically rejected an attempt to exempt regularly conducted, non-collusive foreclosure sales from the definition of "transfer" and thereby from § 548(a)(2). Compare S.445, 98th Cong., 1st Sess. § 360 (193) with S.445, 98th Cong., 1st Sess. § 360 at 104 (1986).

Since the 1984 BAJFA amendments to the Code, there has been no dispute that foreclosure sales in which the debtor receives less than reasonably equivalent value are avoidable under § 548. Controversy continues, however, as

[4] The Ninth Circuit explicitly acknowledged as much in In re Ehring, 900 F.2d 184, 187 (9th Cir. 1990), stating that BAJFA makes clear that foreclosures are transfers.

to the appropriate standard to use in measuring "reasonably equivalent value" in the foreclosure sale context.

II. THERE IS NO STATUTORY BASIS FOR THE NINTH CIRCUIT'S DISTINCTION BETWEEN FORECLOSURES AND OTHER TRANSFERS FOR THE PURPOSE OF ESTABLISHING REASONABLY EQUIVALENT VALUE UNDER SECTION 548(a)(2)

Three separate tests for determining "reasonably equivalent value" have emerged among the Courts of Appeal. First, under the Fifth Circuit's opinion in Durrett, 621 F.2d at 203, transfers arising from a non-collusive foreclosure sale which receive less than a substantial percentage[5] of the fair

[5] The Durrett court stated that the foreclosure sale deprived the bankruptcy estate of an equity in the property of $84,600.00 (57.7% of the market value) and that the court was unable to locate a court decision where a transfer had been approved for less than 70% of the market value. The Fifth Circuit's reference to 70% has led other courts and commentators to read that opinion as establishing a fixed percentage mark or bright-line rule - the so-called "Durrett 70% rule." As the Seventh Circuit noted in In re Bundles, 856 F.2d 815, 820 (7th Cir. 1988), this is incorrect. The Fifth Circuit actually simply analyzed the question of reasonably equivalent value in terms of whether the foreclosure sale price is some acceptable percentage of the market value of the property. See Durrett at 621 F.2d 203-204. Subsequently in Walker v.

market value of the property are held to be for less than reasonably equivalent value and can accordingly be set aside under § 548(a)(2). That test is based primarily on a comparison of the fair market value of the property with the price obtained at the sale and precludes extraneous considerations like the foreclosure procedures. (The "Durrett-like", or "comparison of foreclosure price to value" test.)[6]

Littleton (In Re Littleton), 888 F.2d 90, 93 (11th Cir. 1989), the Eleventh Circuit warned against talismanic adherence to the 70% figure, stating that it was not a completely rigid percentage and holding that in the facts of that case the bankrupt estate was deprived of little or no equity due to the existence of junior liens on the property. See also In re Grissom, 955 F.2d 1440, 1446 (11th Cir. 1992) (Durrett's test "should only be used as a guideline", but if foreclosure sale achieves less than 70% of the market value, that is a factor in rebutting any presumption of reasonableness of the sale).

[6] Durrett was actually decided under § 67(d) of the former Bankruptcy Act, which was the precursor to § 548(a)(2) of the Bankruptcy Code. The Bankruptcy Reform Act of 1978 replaced "fair consideration" by "reasonably equivalent value". See, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, Section 548, 92 Stat. 2549. Although Durrett was decided in 1980, the law applied was § 67(d) of the Bankruptcy Act. The new Bankruptcy Code did not change the pre-existing law regarding the avoidance of transfers. Thus, Durrett and its progeny are not based on a change in law. That is not an issue in this case. A similar approach to that of Durrett was adopted by the Eighth Circuit in

Second, under the Ninth Circuit's Bankruptcy Appellate Panel opinion in Madrid, 21 B.R. 424 (Bankr. 9th Cir. 1982) and in the Ninth Circuit's opinion in BFP, 974 F.2d at 1148, property obtained at a regularly conducted, non-collusive foreclosure sale was found to satisfy the reasonably equivalent value test as a matter of law. (The "BFP" test.)[7] Finally, the Seventh Circuit in Bundles v. Baker (In re Bundles), 856 F.2d 815, 823-24 (7th Cir. 1988) opted for a standard that looks to the "totality of the circumstances" of the foreclosure sale, with the starting point for the court's

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First Fed. Sav. & Loan Ass'n v. Hulm (In re Hulm), 738 F.2d 323 (8th Cir.) cert. denied, 469 U.S. 990 (1984) which rejected the Ninth Circuit's view that the foreclosure sale price itself per se constitutes, "reasonably equivalent value" and remanded for an evidentiary hearing to determine the value of the transfer. See also General Indus., Inc. v. Shea (In re General Indus. Inc.), 79 B.R. 124 (Bankr. D. Mass. 1987).

[7] Only the Sixth Circuit has followed the decision of the Madrid Bankruptcy Appellate Panel which BFP also followed in the Ninth Circuit. See In re Winshall Settlor's Trust, 758 F.2d 1136, 1138-40 (6th Cir. 1985).

review being the fair market value of the property.[8] (The "Bundles" test). Bundles effectively establishes a rebuttable presumption that the price received at a regularly conducted foreclosure sale represents reasonably equivalent value. Id. at 824. In determining whether this presumption has been successfully rebutted the court looks to such factors as whether a fair appraisal of the property was provided, the extent to which the sale was advertised, and the sufficiency of competitive bidding, if any, during the sale. Id. at 824-825. Thus, to illustrate the three approaches, a non-collusive, regularly conducted foreclosure sale yielding 40% of the property's fair market value, would be avoided under Durrett, upheld under BFP, and only avoided under Bundles if the trustee could, based on the totality of the circumstances, rebut the presumption that the foreclosure sale price represented reasonably equivalent value.

The BFP and Bundles tests are inherently flawed in that they ignore the plain language of § 548(a)(2) and grant undue deference to state law concerning foreclosure sale procedures. Section 548(a)(2) does not state that a foreclosure sale price presumptively constitutes "reasonably equivalent value," nor does it state that the bid price obtained at a foreclosure sale that complied with state procedures is reasonably equivalent value. The statute makes no distinction between foreclosure sales and other types of transfers, nor does it distinguish between sales that do or do not comply with state laws governing foreclosure procedures.

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[8] See also Barrett v. Commonwealth Fed. Sav. & Loan Ass'n (In re Barrett), 939 F.2d 20 (3d Cir.1991) (rejecting Madrid rule that foreclosure sale price contitutes reasonably equivalent value and adopting Bundles-type totality of the circumstances test); (In Re Morris Communications NC, Inc., 914 F.2d 458 (4th Cir. 1990) (same); In re Grissom, 955 F.2d 1440, 1446 (11th Cir. 1992); (same) In re General Indus., 79 B.R. 124, 132 (Bankr. D.Mass. 1985) ("Reasonably equivalent value implies a rule of reasonableness in light of the particular circumstances."); In re Pruitt, 72 B.R. 436, 445-446 (Bankr. E.D.N.Y. 1987) ("This court is convinced that the case by case approach is the appropriate way of ascertaining whether a foreclosure sale is the reasonably equivalent value of the property for purposes of § 548(a)(2)"; In re National Envtl. Sys. Co., 111 B.R. 4, 9 (Bankr. D.N.H. 1989) ("This court adopts the Bundles flexibility rule in the absence of any other guidance by binding precedent in this circuit").

The judicially imported irrebuttable presumption of BFP and the extraneous foreclosure procedure factors considered highly relevant in Bundles are examples of judicial legislation upon which this Court should not affix its imprimatur. This Court should adopt a Durrett-like test which articulates a reasoned, clear, federal standard for determining value. Such a value-oriented standard recognizes that the only factors made relevant by the statute itself are the price obtained at the transfer and the measure of its equivalence to the actual value of the property.

As in all cases, the starting point in this case must be the statutory language itself. See Toibb v. Radloff, 111 S. Ct. 2197, 2200 (1991); Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 556 (1990); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989). And where, as here, the plain language is susceptible to a rational interpretation consistent with the purposes underlying the Bankrupcty Code, it should also be the ending point. The

words "reasonably", "equivalent," and "value"[9] are words of common meaning. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979); accord, Mills Music, Inc. v. Snyder 469 U.S. 153, 164 (1985); Escondido Mut. Water Co. v. LaJolla Band of Mission Indians, 466 U.S. 765, 772 (1984). As "reasonably equivalent value" has not been otherwise defined in the Bankruptcy Code, this Court must look to the ordinary common meaning of the words. The common meaning of "reasonable" is "[f]air, proper, just, moderate ... rational, equitable, fair, suitable, moderate, tolerable."[10] Black's Law

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[9] Section § 548(d)(2)(A) defines value as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor," which definition aids little in interpreting "reasonably equivalent value". See In Re Bundles, 856 F. 2d 815, 824 (7th Cir. 1988).

[10] It is also defined as "moderate, ... that allows a fair profit". Webster's Third New International Dictionary, 1892 (1966).

Dictionary 1265 (6th ed. 1990). The common meaning of "equivalent" is "[e]qual in value, force, measure ... having equal or corresponding import ... alike, identical."[11] Id. at 541. The common meaning of "value" is "[t]he estimated or appraised worth of any object or property, calculated in money . . . saleable value, actual value, market value, fair value, reasonable value, and cash value may all mean the same thing."[12] Id. at 1551.

Thus, the common meaning of reasonably equivalent value results in a standard that mandates that foreclosure sales, like any other transfers, must be avoided unless the consideration given by the purchaser is fairly (or moderately) equal (or alike) to the value of the property in reasonable,

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[11] It is also defined as "[e]qual in ... amount, ... [or] value ... corresponding or virtually identical". Websters supra note 10, at 769.

[12] It is also defined as "[t]he amount of a commodity ... that is the equivalent of something else; a fair return in goods, services, or money." Websters supra note 10, at 2530.

fair, saleable, or cash value. While it is true that Congress did not use the term "fair market value"[13] in lieu of "reasonably equivalent value" in § 548(a)(2), neither did Congress state that "reasonably equivalent value" means whatever price is obtained at a regularly conducted, non-collusive foreclosure sale. A Durrett-like rule where the foreclosure price is compared to the fair market value and where 70% is a benchmark for reasonable equivalence gives credence to the common meaning of the statutory language.[14] This rule also takes into account the fact that

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[13] Black's Law Dictionary defines "market value" as "[f]air value of property as between one who wants to purchase it and another who desires to sell it. What willing purchaser will give for property under fair market conditions. Not what the owner could realize at a forced sale, but the price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make a sale of like property." Black's Law Dictionary, 1552 (6th ed. 1990) (citations omitted).

[14] It also has the benefit of encouraging potential purchasers at foreclosure sales to bid higher prices to ensure that the sale is not subsequently set aside pursuant to § 548. See, Philip Shuchman, Data on Durrett Controversy, 9 Cardozo L. Rev. 605, 619 n.58 (1987); John Mixon, Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism that Increases

a foreclosure sale may have occurred and that an optimum price was not obtained. That is why Congress used the word "reasonably". The courts that use a Durrett-like test are saying that they will not avoid a transfer by foreclosure that is for 80% or 90% of the value of the property. But a foreclosure price that is 65% or 70% of value may not, under the facts of the case, be reasonable. For example, Amicus Frank Allen's home was sold at tax foreclosure for a mere 1% of the appraised value of the property, and Amici Levander and Elnora McKeever's home was sold at tax foreclosure for only 9% of its value. Amici are hard put to comprehend how these foreclosure prices could ever be held to be "reasonably equivalent" to the value of their homes.

The real issue for purposes of § 548(a)(2) is whether or not the debtor's estate has suffered a significant loss, because the purpose of § 548 is to recover for the estate

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Personal Tragedy, Impedes Regional Economic Recovery, and Means Little to Lenders, 22 Texas Tech. L. Rev. 1, 31 (1991).

assets that could be distributed to unsecured creditors (or to equity security holders, or to the debtor as exempt property). See In re Lindsay, 98 B.R. 983, 989 (Bankr. S.D. Cal. 1989) (debtor's other creditors are deprived of recourse to an asset of the estate by an improvident sale) In re New Yorketown Assocs., 40 B.R. 701, 705 (Bankr. E.D. Pa. 1984) (Section 548(a)(2) designed to rectify prepetition depletion of debtor's estate). Hence, § 548(a)(2) plainly states that any transfers of property where the debtor receives an amount that is of less than reasonably equal value for the property must be avoided. There is no exemption or special test for foreclosure sales. Congress intended that a debtor's unsecured creditors not be deprived of their rightful share in the distribution of the debtor's estate by a transfer that is for insufficient value. Thus, the value received by the debtor in relation to the value of the property transferred is the relevant question of fact. See First Fed. Sav. & Loan Ass'n v. Hulm

(In re Hulm), 738 F.2d 323, 327 (8th Cir.), cert. denied, 469 U.S. 990 (1984).

And, it should also be noted that Congress carefully protected the interests of a third party good faith purchaser at foreclosure sales when that transfer is avoided by providing that the purchaser retains a lien on the property as security for the purchase price paid. 11 U.S.C. §§ 548(c), 550(d). See Durrett, 621 F.2d at 204. Hence, adopting a Durrett-like standard would not harm third party good faith purchasers.

Outside of the context of foreclosure sales, it has long been established that § 548(a)(2) mandates a comparison of the value received by the debtor in a transfer with the fair market value of the transferred property. See, e.g., Gray v. Snyder, 704 F.2d 709, 713 (4th Cir. 1983) (conveyance of property in exchange for release of marital property rights remanded to determine whether release of support rights constituted reasonably equivalent value); In re Ozark

Restaurant Equip. Co., 850 F.2d 342, 345 (8th Cir. 1988) (determining whether or not debtor received "fair exchange" in marketplace for sale of debtor's equipment); In re McConnell, 934 F.2d 662, 665 (5th Cir. 1991) ($600,000 down payment on purchase option agreement void where "fair market value" of option property in declining market was $320,000 and selling price was $819,000); In re Jeffrey Bigelow Design Group, Inc., 956 F.2d 479, 485 (4th Cir. 1992) (determining whether or not estate received "approximate value" of debtor's payments on a line of credit).

In Covey v. Commercial Nat'l Bank, 960 F.2d 657, 662 (7th Cir. 1992), for example, the sale of the debtor's assets was avoided because the debtor did not receive reasonably equivalent value given the "true or market value" even though debtor received a reasonably equivalent value given the amount of his remaining indebtedness. Because courts analyzing reasonably equivalent value outside of the

foreclosure sale context recognize the depressive effect of valuations based on a comparison of the receipt from the sale and the amount of the indebtedness, reasonably equivalent value is not determined by comparing what the creditor received from a forced sale with the amount of the indebtedness. See Id. at 661-662 (criticizing practice of allowing creditor who seizes asset and sells it for amount that merely covers amount of indebtedness; such a sale yields reasonably equivalent value only as to the amount of the indebtedness but not as to transferred property's "true value"). Cf. In re Abbott's Dairies, 788 F.2d 143, 149 (3rd Cir. 1986) (rejecting assumption that auctioning off assets establishes that purchasers paid value for transferred property). Reasonably equivalent value is therefore determined by comparing the fair market value of the transferred property with the consideration the debtor received in exchange for that property. See Gray, 704 F.2d at 713; Mellon Bank v. Metro Communications, Inc., 945

F.2d 635, 647 (3d Cir. 1991); In re Jeffrey Bigelow, 956 F.2d at 479; Covey, 960 F.2d at 662.[15]

Thus, the plain language of § 548(a)(2) mandates that this Court reverse the decision of the Ninth Circuit Court of Appeals.

III. THE LEGISLATIVE HISTORY ALSO SUPPORTS PETITIONER'S "REASONABLY EQUIVALENT VALUE" TEST

To the extent that the language of § 548(a)(2) is deemed to be subject to alternative interpretations, one must look to the statutory scheme as a whole and its legislative history in order to determine the meaning Congress intended when it chose particular language. As this Court observed in United Sav. Ass'n v. Timbers of Inwood Forest Assoc.

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[15] In determining reasonably equivalent value courts examine several factors that affect the value of the transferred property. In re Abbotts Dairies, 788 F.2d at 149 (appraisal value); In re Ozark Restaurant Equip., 850 F.2d at 345 (market conditions faced by willing seller and willing buyer); In re McConnell, 934 F.2d at 655 (property value at time of sale and market conditions); Mellon Bank v. Metro Communications, 945 F.2d 648 (expert testimony re: value of consideration received compared with value given).

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme--because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

484 U.S. 365, 371 (1988) (citations omitted).

One of the basic purposes and policies of the Bankruptcy Code is to ensure the equitable distribution of the debtor's entire estate to all creditors through, inter alia, the Trustee's power to avoid preferences and fraudulent transfers made intentionally, see § 548(a)(1), or constructively, see § 548(a)(2). Another basic policy and purpose of the Bankruptcy Code is to give the debtor a fresh start.[16] As this Court has stated:

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[16] See, e.g., H.R. Rep. No. 595, 95th Cong., 1st Sess. 117 (1977) (fresh start is "the essence of modern bankruptcy law"). See also id. at 118 (Ch. 13 is designed to ensure "the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start).

> This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."

Grogan v. Garner, 111 S. Ct. 654, 659 (1991), quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). Thus, the only reasonably equivalent value test that is truly consistent with these two goals of ensuring equitable distribution of the debtor's entire estate - including his equity in his home - to all creditors and ensuring the debtor a fresh start by not depriving him of his exempt equity exemption, is a Durrett-like rule that recognizes the primacy of the percentage value lost to the estate by the transfer. This Court should hold that the appropriate standard is a comparison of the foreclosure price achieved in relation to the fair or reasonable value of the property to determine what the debtor received in return for what he surrendered. See In re Brasby, 109 B.R. 113,

124-125 (Bankr. E.D. Pa. 1990);[17] Ananko v. Harsanyi, 91 B.R. 231 (D.N.J. 1988); See also Richardson v. Gillman (In re Richardson), 23 B.R. 434, 447 (Bankr. D. Utah 1982); Martin v. Phillips (In re Butcher), 58 B.R. 128, 130 (Bankr. E.D. Tenn. 1986); Meister v. Jamison (In re Jamison), 21 B.R. 380, 382 (Bankr. D. Conn. 1982).

Further, the significance of the absence of any reference to regularly conducted, non-collusive foreclosure sales as an exception to the reasonably equivalent value test is buttressed by the fact that in 1984, Congress, when considering amendments to the Code, expressly rejected an amendment that would exclude regularly conducted, non-collusive foreclosure sales from the avoidable transfer provisions of the Code. Congress thereby refused to overrule Durrett. Thus, the ultimate intent of Congress coincides with

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[17] In Brasby, the Bankruptcy Court recognized the difficulties inherent in the valuation process but noted that "[v]aluation of [non-commercial real estate] is not that difficult (utilizing the comparative market approach)." 109 B.R. at 124-125.

the foregoing statutory construction. Cf. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985).

Despite this, a number of critics point to a colloquy of Senators Dole and DeConcini on the Senate floor in an attempt to assert that Congress did not codify the Durrett case. See Bundles, 856 F.2d at 821 (parties cite to colloquy which court rejects as legislative history stating "Congress did not legislate an irrebuttable presumption in the case of mortgage foreclosure sales"). See also Verna, 58 B.R. at 251 ("court declines to adopt some kind of reverse parol evidence rule, where oral statements are elevated above enacted language in determining the meaning of the statute"). These critics fail to point out, however, that the colloquy is of no value as legislative history because it took place after Congress passed the amendments to the Code.

Professor Kennedy notes[18] this effort at creating post facto legislative history in an attempt to undermine Congress' firm rejectance of the regularly conducted non-collusive foreclosure sale exemption and asserts that:

> Quite apart from the inutility of legislative history to undo what is written in enacted statutes, Cf. Verna v. Dorman (In re Verna), 58 Bankr 246, 251 n.7 (Bankr. C.D. Cal. 1986) (declining "to adopt some kind of reverse parol evidence rule, where oral statements are elevated above inacted language in determining the meaning of the statute") (further citations omitted), it is well established that post-enactment comments by legislators, in or out of legislative halls, do not constitute legitimate legislative history. See National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 639 n. 34 (1967) (further citations omitted).

Kennedy, Involuntary Fraudulent Transfers, 9 Cardozo L. Rev. 531, 566 (1987).

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[18] Professor Kennedy states, "[t]he efforts to engraft the amendment ironically succeeded only in causing the addition of language to the Code that precludes future misinterpretations ignoring the Congressional purpose of [making foreclosure sales subject] to avoidance as fraudulent transfers." See Kennedy, Involuntary Fraudulent Transfers, 9 Cardozo L. Rev. 531, 565 (1987).

The Bankruptcy Court in Verna, further notes that when this result of the 1984 amendments was called to its attention, "Congress did intentionally leave this result undisturbed," 58 B.R. at 251, despite the Dole/DeConcini colloquy, and refused to reinstate the Ninth Circuit Bankruptcy Appellate Panel's Madrid decision (holding, like BFP, that a regularly conducted, non-collusive foreclosure sale establishes the reasonable equivalent value of the property). Hence, the plain meaning of the "less than reasonably equivalent value" standard, the legislative history of the BAJFA amendments, and the statutory scheme as a whole lead to the inevitable conclusion that the BFP holding of the Ninth Circuit below must be rejected by this Court.

IV. RESPONDENTS' HEAVY RELIANCE ON POLICY CONCERNS SUPPOSEDLY FAVORING AN INVIOLABLE FORECLOSURE PROCESS IS MISPLACED: SUCH POLICY CONCERNS ARE NOT ONLY IRRELEVANT IN LIGHT OF THE PLAIN LANGUAGE OF THE STATUTE, THEY ARE ALSO NEBULOUS AND UNSUPPORTED BY EMPIRICAL EVIDENCE.

The Courts of Appeals which rejected the Durrett doctrine and followed either the Madrid/BFP or the Bundles approach, (focusing on whether a foreclosure sale was regularly conducted and non-collusive) based their determinations on policy concerns. However, it is beyond the courts' scope of review to consider any policy implications to decide this case. Such considerations can only be addressed by Congress. First Fed. Sav. & Loan Ass'n v. Hulm (In re Hulm), 738 F.2d 323, 327 (8th Cir.), cert. denied, 469 U.S. 990 (1984), accord, Bundles, 856 F.2d at 823.

Amici submit that, given the clear statutory language of Section 548(a)(2) wherein Congress has established a

federal standard permitting avoidance of transfers for less than reasonably equivalent value, it is beyond the judiciary's power to substitute state law policy considerations, or, social and economic policy concerns for those of Congress as articulated in the Code. See Hulm, 738 F.2d at 327; Bundles, 856 F.2d 815. See also Shuchman, Data on the Durrett Controversy, 9 Cardozo L. Rev. 605 (1987).

A. This Is Not An Issue Where State Law Property Interests Are Considered Paramount By Congress.

The Ninth Circuit in Madrid postulated that any reading of § 548(a)(2) that holds foreclosure sales to be avoidable transfers, or, that holds a standard for determining "reasonably equivalent value", which does not exempt foreclosure sales and that therefore permits bankruptcy courts to set aside such sales, would destabilize the mortgage market. The court stated that "[c]reating a federal de facto right of redemption under the bankruptcy laws is clearly

contrary to Nevada real property law." Madrid, 725 F.2d at 1202 (citations omitted). The court posited that such a federal right of redemption would chill participation at foreclosure sales and have negative repercussions in the lending arena. Id. Madrid and its progeny including BFP characterize the issue as being one of defining the proper relationship between federal bankruptcy law and non-bankruptcy state law, rather than focusing, as they should, on statutory construction. The Madrid court cited this Court's decision in Butner v. United States, 440 U.S. 48, 54 (1979) for the proposition that courts should not use § 548 or any provision of the Bankruptcy Code to alter existing property interests under state law absent an overruling federal interest. See Bundles, 856 F.2d at 819. Butner, however, is clearly inapposite because:

> [I]n Butner, the issue was whether the right to rents collected during the period between the mortgagor's bankruptcy and the foreclosure sale of the mortgage property should be determined by a federal rule of equity or by

> state law. The Court held that, where Congress has not exercised its power to establish bankruptcies, state law should be applied. ... Here, Congress has not left the determination of property rights to state law. Rather, Congress has enacted a federal rule defining when a foreclosure sale may be set aside in bankruptcy.

Bundles, 856 F.2d at 822. The Seventh Circuit then noted that this Court in Butner expressly recognized that Congress in enacting § 548 clearly delineated a federal property rule for bankruptcy.

> The constitutional authority of Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States" would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate. But Congress has not chosen to exercise its power to fashion any such rule. The Bankruptcy Act does include provisions invalidating certain security interests as fraudulent, or as improper preferences over general creditors. Apart from these provisions, however, Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.

Butner, 440 U.S. at 54 (footnotes omitted) (emphasis supplied in Butner). In an accompanying footnote, the Court listed 11 U.S.C. § 107(d) of the old Bankruptcy Act (presently codified at § 548(a) of the Code) as an example of a provision in which Congress has established a federal property rule for bankruptcy. Id. at 54 n.8, 99 S. Ct. at 917.

As the Bankruptcy Court in Richardson stated:

> [s]tate law's sanction of exchanges in foreclosureswhich are not reasonably equivalent gives effect to state contract and foreclosure policy but may overlook the interests of other creditors of the debtor.The determination of reasonable equivalence should not be controlled by state law. Rather, reasonable equivalence should be determined in light of the function of Section 548 in fostering an equitable distribution of the debtor's property.

In re Richardson, 23 B.R. 434, 447 (Bankr. D. Utah. 1982).

Thus, this Court must reject the view of the Circuit Courts that state foreclosure law should determine the standard of reasonably equivalent value where Congress clearly set forth a federal standard which does not, by its

plain language, grant an irrebuttable or a rebuttable presumption that a state foreclosure sale price determines the avoidability of that transfer.

B. Respondents' Economic And Social Policy Concerns Are Not Supported By Logic Or Empirical Evidence.

Putting aside the fact that it is not the province of the judiciary but that of Congress to consider the economic and societal policy implications of bankruptcy courts setting aside foreclosure sales as constructively fraudulent transfers, see Bundles, 856 F.2d at 823, the concern that permitting avoidances of these transfers would destabilize mortgage markets is chimerical. Nevertheless, the BFP court posits that failing to make foreclosure bids sacrosanct on the issue of reasonably equivalent value will result in depressed foreclosure sale prices and higher costs in the mortgage markets.

These rationales underlying the BFP, Bundles and Barrett decisions are fatally and inherently flawed. They are

flawed because: first they erroneously assume that state foreclosure procedures are designed to obtain high prices; and second, they erroneously postulate that permitting the avoidance of foreclosure sales will chill real estate foreclosures and further depress prices obtained at such sales. Empirical studies, however, demonstrate that setting aside foreclosure sales will not result in higher mortgage loan costs or in destabilized mortgage markets and in fact, show that it is equally as likely that it results in lower loan costs and promotes economic efficiency in the market. Adopting a reasonably equivalent value test that compares the foreclosure sale price with the property's market value will serve the Bankruptcy Code policies of equitable distribution among creditors of the debtor's assets, and, granting the debtor a fresh start.

1. Existing State Foreclosure Procedures Do Not Contain Protections Which Would Ensure That The Debtor's Bankruptcy Estate Will Obtain Value For Foreclosed Property.

Historically, the law of mortgage foreclosure has veered between protecting the rights of mortgagees and protecting the rights of mortgagors depending upon whose interests were seen by the legislators and courts to be more pressing. See Weschler, Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure - An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L. Rev. 850 (1985). In the American colonies foreclosures without sales, known as strict foreclosures, were quickly recognized as being unduly harsh on mortgagors with the eventual result that foreclosure sales, judicial or non-judicial, became the established, primary method of foreclosure by the early 1800's. Id. at 858. Strict foreclosures were disfavored because the mortgagee could:

acquire land far more valuable than the mortgage debt, a result considered harsh, oppressive and unfair [while] [f]oreclosure by sale was viewed as a logical way of protecting the debtor's equity in the property while still allowing the mortgagee to recover a deficiency judgment[20] when the proceeds of the sale fell short of the amount owed by the mortgager. Furthermore, during the early development of foreclosure by sale in the United States, the high level of activity in the real estate market justified the conclusion that competitive bidding would assure fair prices. In theory, public sales in such a market would reduce deficiencies and perhaps yield surpluses, which could be paid to mortgagors or junior lienors.

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[20] It has been persuasively argued that deficiency judgments after home mortgage foreclosures result in crushing financial disaster to the mortgagor, impede regional economic recovery in times of severe economic decline, and, provide little, if any, economic benefit to mortgage lenders and that statutorily limiting or eliminating personal liability for deficiency judgments is required to prevent these harsh unnecessary results. See Mixon, Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism that Increases Personal Tragedy, Impedes Regional Economic Recovery, and Means Little to Lenders, 22 Texas Tech. L. Rev. 1 (1991). See also Skilton, Assessing the Mortgage Debtor's Personal Liability, 90 Univ. of Penn. L. Rev. 440 (1941-42).

Id. at 859-60. (citations omitted). Thus, if state mortgage foreclosure sale procedures in fact worked to increase foreclosure sale prices as they were originally intended to do, then § 548(a)(2) would hardly ever be utilized to set aside such a sale because it would result in a price that would actually be reasonably equivalent to the fair market value of the property.

The reality of the foreclosure sale market is quite different, however. Thus, the courts adopting the BFP and Bundles tests are in error when:

> [t]hey assume that state foreclosure procedures are designed to attract bidders and bring the highest price possible under the circumstances for real property. Quite often the opposite is true. Most state real estate foreclosure laws require little in the way of advertising regardless of whether or not sales are judicially supervised.[21]

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[21] See also In re Pruitt, 72 B.R. 436, 446 (Bankr. E.D. N.Y. 1987); In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa. 1990).

General Indus., Inc. v. Shea (In re General Indus., Inc)., 79 B.R. 124, 131-32 (Bankr. D. Mass. 1987).

Foreclosure sales often do not produce a bid price that is truly a reasonably equivalent value. Foreclosure sale prices, whether judicial or non-judicial, are usually significantly below actual fair market value "because they reflect the fact that the sale is a forced sale rather than an arm's length, free market sale between a willing buyer and a willing seller." Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 847 (1980). Foreclosure sales are rarely advertised in a manner designed to attract bidders because the mortgagee is usually only required to advertise in legal columns of local newspapers. Foreclosure sales are thus not advertised in the general real estate market and so rarely will be conducted in a commercially reasonable manner. Id. Notice provisions of foreclosure sales are primarily designed to meet due process interests of owners

and lien creditors and not to maximize the sale price. See In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa. 1990). The result is that a small group of speculators appears at foreclosure sales intent upon purchasing property for very low prices. Lack of active competitive bidding "frequently results in purchase of the property by the foreclosing mortgagee at a nominal price." Washburn, supra, at 848. In reality, the foreclosure sale purchasers obtain a significant windfall when property is sold for less than a full fair value. Many commentators[22] and a number of courts[23] have noted that result in the typical foreclosure sale. There is little doubt that the fear of losing this windfall in the current foreclosure sale process has engendered much of the opposition to Durrett and is the driving force underlying the

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[22] See, e.g., the Washburn, supra, at 880-81; Kennedy, supra, at 560; Weschler, supra, at 885; Mixon, supra, at 33-34; Skilton, supra, at 444-45.

[23] See In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa. 1990); In re Lindsay, 98 B.R. 983 (Bankr. S.D. Cal. 1989).

support of a reasonably equivalent value rule that essentially exempts foreclosure sales. There is no reason to allow commercial entities that follow the minimal requirements of state foreclosure procedures to reap the debtor's equity. To permit them to do so directly conflicts with a crucial policy of § 548 of the Bankruptcy Code - to ensure that bankruptcy estates will not be depleted. See In re Grissom, 955 F.2d 1440, 1447 (11th Cir. 1992).[24]

Further, it should be noted that the mortgagee, who must bid[25] in order to apply the property to the debt and obtain a deficiency judgment "has no incentive to bid fair market value and often bids only a nominal amount, since regardless of the bid amount, the successful mortgagee

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[24] See, e.g., General Indus., Inc,. v. Shea (In re General Indus. Inc.), 79 B.R. 124, 131-32 (Bankr. D. Mass. 1987) Ruebeck v. Atteboro Sav. Bank (In re Ruebeck) , 55 B.R. 163, 168 (Bankr. D. Mass. 1985); In re Lindsay, 98 B.R. 983, (Bankr. S.D. Cal. 1989); In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa.) (1990).

[25] Weschler's empirical study found that mortgagees purchase the property at foreclosure sales at least 75% of the time. Weschler, supra at 870.

obtains title to the property and can realize its market value upon resale." Washburn, The Judicial an Legislative Response to Price Inadequacy in Mortgage Forclosure Sales, 53 So. Cal. L. Rev. 843, 849 (1980). This results in: the mortgagee realizing a double recovery; the mortgagor losing the property and in some cases being subjected to a deficiency judgment;[26] and, due to the inadequate sale price, the mortgagor losing his equity in the property. Further, in bankruptcy the debtor loses his equity exemption, and the unsecured creditors are deprived of their equitable share in the distribution of the estate because the debtor's equity is

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[26] Where there's a low bid, and the market value of the property exceeds the indebtedness, the mortgagor experiences a double loss because the deficiency judgment is often based on the sale price not the market value. Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 850 (1980). See also Mixon, Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism That Increases Personal Tragedy, Impedes Regional Economic Recovery and Means Little to Lenders, 22 Texas Tech. L. Rev. 1 (1991); Skilton, supra at 451. Consumers suffer similar losses when their personal property is sold in the foreclosure process. Shuchman, supra at 620 n.60.

lost at the typical foreclosure sale. This is, of course, precisely what Section 548(a)(2) is designed to prevent.

Additionally, many courts rest their determinations that a rebuttable or an irrebuttable presumption of reasonably equivalent value is derived from the foreclosure sale bid price, in part, on the assertion that foreclosure sales to third party good faith purchasers, represent "arm's length" transactions and should therefore be deemed sacrosanct and unavoidable under § 548(a)(2). See Lawyers Title Ins. Corp. v. Madrid (In re Madrid) 21 B.R. 424 (9th Cir. BAP 1982), aff'd, 725 F.2d 1197 (9th Cir.), cert. denied, 469 U.S 833 (1984). However, this analysis completely ignores the Bankruptcy's Code's recognition that some fraudulent transfers are, in fact, made at arm's length to a good faith purchaser.

The interests of the third party good faith purchaser are protected by the Bankruptcy Code to the full extent of their investment because the purchaser retains a lien on the

property as security for the purchase price paid for the avoided transfer. 11 U.S.C. §§ 548(c), 550(d). See also Durrett, 621 F.2d at 204 (directing that the property be dealt with "in such manner as will protect the [buyer's] equity therein"); Kennedy, supra at 578-79 n. 196. Therefore, Congress took care to balance the interests of creditors and good faith transferees when providing that constructively fraudulent transfers are avoidable under § 548.

2. There Is No Evidence That § 548 Bankruptcy Remedies Depress Prices At Foreclosure Sales: It Is Equally Possible To Hypothesize That Prices At Foreclosures Are Elevated To Preclude Potential Avoidance Of Sales for Less Than Reasonably Equivalent Value

A second frequently cited rationale posited in support of rendering foreclosure sale bids sacrosanct under Section 548(a)(2) was first articulated in the dissent in Abramson:

> The cloud created over mortgages and trust deeds by making foreclosure sales subject to being voided by a bankruptcy trustee will naturally inhibit a purchaser other than the mortgagee from buying at foreclosure. This

> tends to depress further the prices of foreclosure sales and thus increase the potential size of the deficiency in each foreclosure.

Abramson v. Lakewood Bank & Trust, Inc., 647 F.2d 547, 550 (5th Cir. 1981) (Clark, J. dissenting) cert. denied, 454 U.S. 1164 (1982). See also BFP, 974 F.2d at 1148; Madrid 725 F.2d at 1202; Alsop v. Alaska (In re Alsop), 14 B.R. 982 (Bankr. D. Alaska 1981), aff'd, 22 B.R. 1017 (D. Alaska 1982).

As Professor Kennedy notes, however, "[t]he argument that application of the Durrett doctrine will encourage bidders at foreclosure or execution sales to lower their bids, attributes to them a perverse incentive to incur the risk of avoidance of their purchases".[27] It fails to recognize

[27] See also Bagley, Mortgage Foreclosures and Deeds in Lieu of Foreclosure: Problems of Bankruptcy and Fraudulent Conveyances, 57 Okla. B.J. 1295, 1299-1301 (1986) (advising foreclosure purchaser to bid reasonably equivalent value); Roberts & Moriarty, Mortgage Foreclosure Sales as Fraudulent Conveyances: The Durrett Issue, 10 Okla. City U.L. Rev. 579, 602 (1985) (advising bidding at least 70% of value of property being sold on foreclosure to avoid risks involved).

that a Durrett-like rule suggesting a 70% benchmark, has the benefit of establishing a reasonable degree of certainty as to whether a bid could be avoided and therefore, is least likely to discourage bidders at foreclosure proceedings. It also fails to recognize that historically the typical foreclosure sale has produced very little in the way of competitive bidding. Skilton, supra, at 445 (empirical study demonstrates "there was practically no competitive bidding at sheriff [or foreclosure] sales.") Further, this purported reason for rendering foreclosure sale bids sacrosanct represents judicial activism at its worst because no empirical evidence supports it. And, in none of the cases citing this rationale has any evidence ever been introduced into the record to support this "finding" by the courts.[28]

[28] See also Resolution Trust Corporation's "Brief for the Federal Respondent" supporting BFP's Petition for Writ of Certiorari, p.7 where Respondent also asserts this rationale without citation to any empirical evidence in support of its position that the BFP irrebuttable presumption rule should be upheld by this Court.

The Ninth Circuit in the instant case utilized this speculative rationale as the primary basis for holding that foreclosure sale prices are per se reasonably equivalent value, asserting that "[a]s has been widely recognized"[29] to do otherwise carries a "strong potential to destabilize mortgage transactions" BFP 974 F.2d at 1148. The court treats the law review article stating this precept as if it took judicial notice of this "fact." Amici submit that there is no basis for the court to take judicial notice of such a precept which is most likely untrue and certainly unproven.[30] In fact, a perusal of

[29] Interestingly, the court only cites to one source for this "widely recognized" concept. Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances Accommdating State and Federal Objectives, 71 Va. L. Rev. 933, 963-64 (1985) (not based on empirical studies). Other law review articles that are based on empirical studies have reached the opposite conclusion. See, Shuchman, Data on Durrett, supra; Schill, An Economic Analysis of Mortgagor Protection Laws, 77 Va. L. Rev. 489 (1991); Weschler, Through the Looking Glass, supra.

[30] In BFP, 974 F.2d at 1149 n.6 the Ninth Circuit asserts that the irrebuttable presumption of foreclosure sale value rule had been adopted by the National Conference of Commissioners on Uniform State Laws in the Uniform Fraudulent Transfer Act § 3(b) (1984) and has been recommended by the ABA's Section of Real Prop.

law review articles based on empirical evidence leads to the contrary conclusion.

Data on the Durrett Controversy, 9 Cardozo L. Rev. 605, 616 (1987),[31] persuasively demonstrates that in the circuits employing Durrett and its progeny there have been no negative effects engendered at foreclosure sales. It also persuasively points out that if there had actually been such dire consequences, as the BFP courts predict, then surely the mortgage lenders advocating the rejection of a Durrett rule wold have provided such empirical evidence to the court in the 1984 Madrid case at which point in time Durrett had been the law for four years. No such evidence was

Rep. 106B. However, Data on Durrett, supra, at 614-618 demonstrates that this "authority" for BFP's position is also imagined, stating that the National Conference of Commissioners and the ABA relied on the same unproven fears of the "dire" effects on the markets of Durrett as is oft repeated in the literature and by the courts.

[31] See also In re General Industries, Inc., 79 B.R. at 133 (Bankr. D. Mass. 1987); In re Lindsay, 98 B.R. 983 (Bankr. S.D. Cal. 1989); In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa. 1990).

presented. Id. at 614-616. In Data on Durrett it is noted that "neither in the April 1983 Senate Hearings on S.445 - which would have changed Section 548 of the Bankruptcy Code to undo the Durrett doctrine - or elsewhere since then could we find any empirical evidence of the claimed bad consequences." Id. at 614. This study of the effects of Durrett on the mortgage lending market and in subsequent foreclosure sales markets clearly demonstrates that these purported "policy" concerns are imagined.

Thus, the argument that the BFP rule increases foreclosure sale prices while a Durrett-like rule would decrease foreclosure sale prices is not only historically inaccurate, it is based on mere assumptions which assumptions, by virtue of repeatedly being re-stated in subsequent court decisions and in the journal literature, are being treated as "well-stablished" fact. This Court should not permit these chimerical policy concerns to dictate a rule of federal law.

3. There Are No Grounds For Assuming That Protecting Against Windfall Profits On Sales That Are For Less Than Reasonably Equivalent Value Will Increase The Cost Of All Mortgage Lending

Lastly, another one of the most often cited policy considerations advanced in support of the contention that foreclosure sales should be irrebuttably presumed to be a "reasonably equivalent value" is that a Durrett-like value rule, such as Amici propose - to compare the value received by the debtor with the fair market value of the transferred property - would destabilize the mortgage market because, inter alia, it would increase the costs of mortgage loans.[32]

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[32] A Durrett-like rule using 70% as a benchmark allows more than enough leeway within which to take into account the vagaries of the market and varying sale conditions. Even if a totality of circumstances test is deemed to be appropriate, the typical foreclosure sale price should only be one minor factor in the analysis because, as previously discussed, foreclosure sales represent inherently unreasonable value due to the fact that they are commercially unreasonable. See Section III. B.1 this brief, supra. Given that the purpose of § 548(a)(2) is to recoup equity lost to the estate by constructively fraudulent pre-petition transfers of real property, any rule adopted by this Court that fails to ensure the maximization of the equity available to unsecured creditors would undermine the Bankruptcy Code.

According to the Ninth Circuit, "[n]egative repercussions would also be likely in the lending arena, where creditors would be less willing to lend funds on the security of a mortgage or deed of trust." Madrid, 725 F.2d at 1202.

A study of the markets after Durrett clearly demonstrates that the empirical evidence totally contradicts these dire predictions of the courts and the mortgage lenders. In Data on Durrett it was stated that "the . . . statistical data on interest rates, loan to price ratios, and total loans created before and after these decisions show that Durrett and Madrid made little, if any, apparent differences either way in those variables" Shuchman, supra, at 615-616. The empirical data "very strongly suggest that the interest rates and the total mortgage loans created ... have all followed national averages regardless of whether a state . . . had adopted or rejected Durrett." Id.

This study demonstrates that the dire predictions of the effects of the Durrett federal redemption doctrine "in the

journal literature and the judicial opinions cite almost no empirical evidence" in support of their predictions such as, inter alia, decreasing the amount, types and extent of credit available, increasing interest rates, and decreasing the amount and availability of financing for the purchase of foreclosed property. Id. Thus, predictions of dire economic consequences for foreclosure sales and credit costs if a Durrett-like reasonably equivalent value rule is adopted are simply speculative fears repeatedly asserted by mortgage lenders. This court should not permit such imagined and unproven concerns to determine the standard for reasonably equivalent value in § 548(a)(2) of the Bankruptcy Code.

IV. CONCLUSION

For all of the foregoing reasons, the decision of the Ninth Circuit Court of Appeals that foreclosure sale prices are irrebuttably presumed to represent reasonably equivalent value should be reversed and this Court should state that reasonably equivalent value is determined by comparing the fair market value of the property with the price obtained at the foreclosure sale.

Respectfully submitted,

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